

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

DIGITAL MEDIA SOLUTIONS, LLC

Plaintiff,

vs.

SOUTH UNIVERSITY OF OHIO, LLC,
et al.

Defendant.

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Case No. 1:19-cv-145

JUDGE DAN AARON POLSTER

MAGISTRATE JUDGE THOMAS M.
PARKER

**LIMITED REPLY TO THE RECEIVER’S RESPONSE TO TECH PARK 6, LLC’S
JOINDER TO MOTION OF 3601 SUNFLOWER LLC TO VACATE
THE INJUNCTION AND RECEIVER ORDER [DOC. 97]**

Tech Park 6, LLC (“Tech Park”), by and through its undersigned counsel, DLA Piper LLP (US), hereby files this limited reply (the “Reply”)¹ to the *Receiver’s Response to Tech Park 6, LLC’s Joinder of 3601 Sunflower to Vacate the Injunction and Receiver Order [Doc.97]* [D.I. 134] (the “Response”) to address the material inaccuracies and omissions contained in the *Declaration of William A. Turbay* (the “Turbay Declaration”), which was signed by Mr. Turbay “under penalty of perjury” and forms the basis for the relief requested in the Response.²

Baldly alleging that “Tech Park does not have clean hands”, the Receiver requests that “Tech Park’s joinder to the motion to vacate should thus be disregarded by this Court.” Response at 3. Given the tsunami of support stacked against the Receiver’s attempt to continue under the

¹ In support of this Reply, Tech Park files the *Declaration of Timothy J. Ballard Limited Reply to the Receiver’s Response to Tech Park 6, LLC’s Joinder of 3601 Sunflower to Vacate the Injunction and Receiver Order [Doc.97]* (“Ballard Decl.”) concurrently herewith.

² Within hours of the Receiver filing the Response, counsel to Tech Park contacted counsel to the Receiver and counsel to Save the Art Institute of Las Vegas, Limited (“SAI LV”) by email. That email identified the inaccuracies contained in the pleadings filed and requested that the Receiver immediately withdraw the Response, withdraw the Turbay Declaration and file a supplementary declaration correcting the record. Neither had the courtesy to even acknowledge Tech Park’s request, which left Tech Park with no choice, but to file this Reply.

Receivership Order,³ whether Tech Park's joinder to the motion to vacate is disregarded is wholly inconsequential. That being said, the Turbay Declaration cannot stand.

William A. Turbay, the Manager of SAI LV, apparently informed the Receiver over the weekend, that during a telephone call with Timothy Ballard on March 7, 2019, he "offered, on behalf of Save the Art Institute of Las Vegas, Limited and assuming its deal with the Receiver is approved by the Court, to assume Ai Las Vegas's lease in full, pay the rent arrearage (excluding interest, penalties, late fees, and attorney fees) over a 24-month period." Turbay Declaration, ¶ 7. Mr. Turbay also alleges that "we were informed that our interest in assuming the lease was not acceptable." *Id.* at ¶ 8.

First, contrary to the Turbay Declaration, SAI LV has not extended an offer to assume the Lease, and certainly has not offered to cure the massive accrued defaults thereunder. Ballard Decl. ¶ 6. While Messrs. Turbay and Ballard (and others, including counsel) participated in a brief telephone call on March 7, 2019, where the prospect of SAI LV assuming the Lease was discussed generally, Mr. Turbay absolutely did not offer to "pay the rent arrearage (excluding interest, penalties, late fees, and attorney fees) over a 24-month period." *Id.* (citing Turbay Declaration, ¶ 8). Rather, if fairly characterized, the March 7 telephone call was, at best, exploratory in nature and focused intently on ensuring that in response to any deal reached between SAI LV and the Receiver, Tech Park would not immediately serve up a 5-day eviction notice. Ballard Decl. ¶ 6.

Second, Mr. Turbay's recounting of Mr. Ballard's alleged response to the prospect of SAI LV assuming the Lease is misleading, at best. Ballard Decl. ¶ 7. Given SAI LV's self-admitted lack of financial resources or credit history and its inability to provide Tech Park a replacement

³ The matters addressed herein are likely to be dealt with by the Court during this afternoon's hearing on the Order to Show Cause. Although counsel to Tech Park was unable to make arrangements on short notice to attend the hearing in person, counsel will listen to the proceedings telephonically.

security deposit or guarantee, assumption of the existing long-term Lease, which runs through January 1, 2025, was not commercially viable and well outside of the normal parameters of any arrangement Tech Park would entertain. *Id.* That being said, Mr. Ballard expressed a willingness to discuss with SAI LV terms of a month-to-month lease that also repaid over time the accumulated rent arrearage. *Id.* To that end, and contrary to the assertion that Mr. Ballard flatly rejected any interest in assuming the Lease, Mr. Ballard actually expressed a willingness to engage with SAI LV regarding the Institute's continued occupancy of the Premises. *Id.*⁴

Based on the material inaccuracies and omissions contained in the Turbay Declaration, Tech Park requests that the Response and Turbay Declaration be stricken. Moreover, given SAI LV and the Receiver's failure to even respond to Tech Park's requests to address the foregoing, Tech Park further requests that SAI LV and/or the Receiver be required to reimburse Tech Park for all reasonable attorneys' fees incurred in connection with addressing the Response and Turbay Declaration and the filing of this Reply.

⁴ Any insinuation from the Receiver or SAI LV that Tech Park can be compelled to accept any offer from SAI LV to assume the existing Lease should be flatly rejected. All rights are hereby reserved.

Dated: March 11, 2019

DLA PIPER LLP (US)

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CERTIFICATE OF SERVICE

In accordance with Section 1.4 of the Electronic Filing and Procedures Manual of the Northern District of Ohio and Federal Rule of Civil Procedure 5(b)(2)(E), a copy of the foregoing has been served through the Court's filing system on all counsel of record on March 11, 2019.

/s/ Richard A. Chesley
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